BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 12-02

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

MAHER TERMINALS, LLC'S MOTION TO STRIKE THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S AFFIRMATIVE DEFENSES

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Maher Terminals, LLC ("Maher"), by and through undersigned counsel, respectfully submits this dispositive Motion to Strike Respondent Port Authority of New York and New Jersey's ("PANYNJ" or the "Port Authority") Affirmative Defenses.

INTRODUCTION

The Port Authority's Amended Answer to Maher's Complaint fails to comport with Commission authority. Commission Rule 62(b)(2)(iv) expressly requires that an answer *must* contain "any affirmative defenses, *including allegations of any additional facts on which the affirmative defenses are based*." 46 C.F.R. § 502.62(b)(2)(iv) (emphasis added). The Port Authority's Amended Answer fails this requirement.

Additionally, the Port Authority improperly asserts denials of the allegations contained in Maher's Complaintalong with assertions that Maher has failed to state a claim, as affirmative defenses. "Denials of a plaintiff's allegations or allegations that the plaintiff cannot prove the elements of her claims are not affirmative defenses." *Jacobson v. Persolve, LLC*, No. 14–CV–00735 LHK, 2014 WL 4090809, at *6 (N.D. Cal. Aug. 19, 2014).

Lastly, the Port Authority's Amended Answer does not contain sufficient factual statements in support of its affirmative defenses so as to render those defenses plausible, in contravention of both Commission authority and pertinent federal precedent. *See, e.g.*, *Hartford Underwriters Ins. Co. v. Kraus USA, Inc.*, No. 15-CV-05514-JSC, 2016 WL 127390, at *2 (N.D. Cal. Jan. 12, 2016) ("While Defendant urges that its threadbare affirmative defenses give Plaintiff 'fair notice,' as described above, the pleading standards of *Iqbal* and *Twombly* apply to affirmative defenses and require sufficient facts to render the defenses plausible."). The Port Authority's refusal to cure the defects is all the more remarkable because it so strenuously

advocated the enforcement of heightened pleading standards in its motion to dismiss in this proceeding. Yet, the Port Authority obstinately disavows them for its own pleading.

The Port Authority's affirmative defenses should be stricken because they improperly assert denials and/or allegations that Maher cannot prove elements of its claims as affirmative defenses, fail to adhere to Commission Rule 62(b)(2)(iv), and fail to allege sufficient facts so as to "render its defenses plausible," as required under the applicable legal standard. Additionally, to streamline this proceeding the Port Authority should be denied leave to amend its answer, particularly considering that "[m]any of the facts necessary to flesh out [the Port Authority]'s allegations have presumably been in its possession for years." Commission Memorandum Opinion and Order at 71–72 (Dec. 18, 2015) ("Order").

FACTUAL AND PROCEDURAL BACKGROUND

On March 30, 2012, Maher filed a Complaint with the Federal Maritime Commission ("FMC") in this proceeding against the Port Authority ("Complaint") alleging violations of the Shipping Act by the Port Authority injuring Maher. The Complaint, Maher's First Set of Interrogatories, and Maher's First Set of Document Requests were served on the Port Authority by the Commission on April 6, 2012.

On April 26, 2012, the Port Authority filed its Motion to Dismiss Maher's Complaint and Request for a Stay of Litigation Pending the Presiding Officer's Resolution of the 08-03 Litigation or, at Minimum, Pending Decision on the Port Authority's Motion to Dismiss ("Motion to Dismiss"), arguing that allegedly, "Maher provides little, if any, factual content to support its new claims," and that Maher's Complaint "lack[s] *any* allegation of injury or factual support sufficient to plead a violation of the Shipping Act." Mot. to Dismiss at 2 (emphasis in original). On May 11, 2012, Maher served its Opposition to the Port Authority's Motion. On

January 30, 2015, the Presiding Officer issued the Initial Decision Granting Motion to Dismiss, underscoring her conclusion that "[a] pleading that offers 'labels and conclusions' … will not do." Initial Decision Granting Motion to Dismiss, at 3 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Maher filed its exceptions to the Initial Decision on February 23, 2015, and on March 17, 2015, the Port Authority filed its Reply to Maher's Exceptions. The Commission issued its Memorandum Opinion and Order on December 17, 2015 and a corrected version on December 18, 2015.

In its Order, the Commission held that:

> The *Iqbal/Twombly* plausibility standard is consistent with sound administrative practice. The Commission's adjudicative proceedings "bear a remarkably strong resemblance to civil litigation in federal courts." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 758 (2002). And the concerns that animated *Twombly* and *Iqbal* are relevant to Shipping Act proceedings.

Id. at 17. The Commission ultimately affirmed the dismissal of Counts II, III, IV, V, VII, IX, X, XI, XIII, and XIV, but remanded Counts I, VI, VIII, and XII of Maher's Complaint for further proceedings before the Presiding Officer.

On January 20, 2016, over one month after the Commission issued its Memorandum Opinion and Order and only after realizing that it had defaulted,[1] the Port Authority served its Answer, which lacked the verification required by Commission Rule 62(b)(2). The Port Authority's Answer also contained six threadbare "defenses and affirmative defenses to the Complaint." Answer at 11. These "defenses and affirmative defenses" lacked any facts.

On February 18, 2015, after being notified by Maher of the deficiencies in its Answer, the Port Authority served its Amended Answer that included a verification—as required by

[1] The Port Authority is well aware of Commission rules governing pleadings and answers, including the risk of default. *See, e.g.*, *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 821, 854–55 (F.M.C. 2014) (discussing the Port Authority's failure to answer Maher's counterclaims and related Commission precedent).

Commission Rule 62(b)(2)—and a withdrawal of one of the Port Authority's factually unsupported affirmative defenses (Sixth Defense). However, as Maher communicated to the Port Authority again on February 26, 2016, the Port Authority's Amended Answer fails to address issues regarding the remaining asserted "defenses and affirmative defenses." For example, the Port Authority initially asserted as an affirmative defense that "[t]he claims for relief asserted by Complainant are barred, in whole or in part, by collateral estoppel," Answer at 11, and subsequently amended its answer to include the additional statement that "[t]he facts supporting this affirmative defense will be developed during discovery." Amended Answer at 12. But this fails to provide sufficient facts so as to render the defenses plausible or satisfy Commission rules and authority requiring that an answer must include "any affirmative defenses, *including allegations of any additional facts on which the affirmative defenses are based*." 46 C.F.R. § 502.62(b)(2)(iv) (emphasis added).

Although this is a dispositive motion, Maher conducted the discussion required by the Amended Initial Order in this proceeding for other motions before filing this motion to strike. Despite Maher's repeated requests to the Port Authority, on February 29, 2016, in the course of preparing the joint status report the Port Authority rejected Maher's request to cure the defects with respect to the affirmative defenses and indicated it would oppose a motion.

LEGAL STANDARD

Commission Rules 46 C.F.R. §§ 502.62(b)(2)(iv) & 502.69 govern. Rule 62(b)(2) expressly mandates that the "answer *must* be verified and contain . . . [a]ny affirmative defenses, including allegations of any additional facts on which the affirmative defenses are based." (emphasis added). And, Rule 69 expressly provides that a request for an order or ruling *must* be by motion and that a dispositive motion pertains to a motion for a decision on a pleading, including a determination on a part of a proceeding, as is the case with this motion.

Also, Commission Rule § 502.12 provides, in pertinent part, that "for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." The federal jurisprudence applying Fed. R. Civ. P. 12(f) accords with the Commission's specific rule on point. The federal rule provides that a court may, upon motion made by a party or on its own, "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." For such a motion to strike an affirmative defense, "[a] showing of prejudice is not required to strike an 'insufficient' portion of the pleading as opposed to 'redundant, immaterial, impertinent, or scandalous matter.'" *Bottoni v. Sallie Mae, Inc.*, No. C 10-03602 LB, 2011 WL 3678878, at *2 (N.D. Cal. Aug. 22, 2011). But in any event, "the obligation to conduct expensive and potentially unnecessary and irrelevant discovery" resulting from a defendant's improperly pleaded affirmative defenses "is a prejudice." *Id.*; *see also Innovative Sports, Mgmt., Inc. v. Neto*, No. CIV.A. 13-1497 SRC, 2013 WL 5935982, at *2 (D.N.J. Nov. 1, 2013) ("Affirmative defenses that will 'substantially complicate the discovery proceedings' prejudice a plaintiff enough to justify granting a Rule 12(f) motion to strike. . . . Allowing the details of Defendants' asserted affirmative defenses to be sorted out during discovery would ultimately result in extensive guesswork as to the nature and scope of each defense as well as unnecessary expenditures and motions."). This federal rule also accords with the Amended Initial Order in this proceeding which underscored the Presiding Officer's expectation that the parties must "attempt to narrow the issues and shorten the proceeding. . . ." Amended Initial Order at 4.

And "th[e] lenient rule" that "[m]otions to strike are disfavored and should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject

matter of the litigation" only applies to "affirmative defenses that are sufficiently pleaded, it is inapplicable to affirmative defenses that are mere statements of legal conclusions with no supporting facts." *CTF Dev., Inc. v. Penta Hospitality, LLC*, No. C 09–02429 WHA, 2009 WL 3517617, at *7–8 (N.D. Cal. Oct. 26, 2009). "Requiring a defendant to bolster its affirmative defenses with *some* factual support comports with *Iqbal*'s message that discovery should not be used as a fishing expedition." *Vogel v. Huntington Oaks Delaware Partners, LLC*, 291 F.R.D. 438, 441 (C.D. Cal. 2013) (emphasis in original). Likewise, as the Commission has ruled more recently, specific and plausible factual allegations are now required before the Commission to avoid "the potentially enormous expense of discovery in cases . . . ." Order at 17.

ARGUMENT

I. The Port Authority's First and Second Affirmative Defenses Are Not Affirmative Defenses and Therefore Should be Stricken

As a threshold matter, the Presiding Officer should strike the Port Authority's first and second defenses as improper affirmative defenses. The Port Authority's first and second affirmative defenses state, respectively in part, that "[t]he claims for relief asserted by Complainant . . . fail to state facts sufficient to constitute a claim for relief against the Port Authority," and "[t]he claims for relief asserted by Complainant are barred . . . because the Port Authority's actions were justified since it acted in accordance with the Shipping Act." Amended Answer at 10. "Affirmative defenses plead matters extraneous to the plaintiff's prima facie case, which deny plaintiff's right to recover, even if the allegations of the complaint are true." *Hartford Underwriters Ins. Co. v. Kraus USA, Inc.*, No. 15-CV-05514-JSC, 2016 WL 127390, at *2 (N.D. Cal. Jan. 12, 2016) (quoting *G & G Closed Circuit Events, LLC v. Nguyen*, No. 10–168, 2010 WL 3749284, at *5 (N.D. Cal. Sept. 23, 2010)). "By contrast, denials of a plaintiff's allegations or allegations that the plaintiff cannot prove the elements of her claims are not

affirmative defenses." *Id*. (quoting *Jacobson v. Persolve, LLC*, No. 14–CV–00735 LHK, 2014 WL 4090809, at *6 (N.D. Cal. Aug. 19, 2014)). And "[i]f an allegation labeled as an 'affirmative defense' is not an affirmative defense, the improper 'affirmative defense' should be stricken as a matter of law[.]" *Dairy Employees Union Local No. 17 v. Dairy*, No. 5:14-CV-01295-RSWL-M, 2015 WL 505934, at *3 (C.D. Cal. Feb. 6, 2015) *reconsideration denied sub nom. Dairy Employees Union Local No. 17 Christian Labor Ass'n of the U.S. Pension Trust v. Ferreira Dairy*, No. 5:14-CV-01295-RSWL, 2015 WL 1952308 (C.D. Cal. Apr. 28, 2015)).

Where respondents have—as here—asserted allegations that a plaintiff cannot prove the elements of his or her claims as affirmative defenses, courts have stricken such allegations as failing to constitute a proper affirmative defense. *Renalds v. S.R.G. Rest. Grp.*, 119 F. Supp. 2d 800, 803 (N.D. Ill. 2000) (striking affirmative defenses that are "no more than a recitation of the standard for a motion to dismiss under Rule 12(b)(6)"); *Minns v. Advanced Clinical Employment Staffing LLC*, No. 13-CV-03249-SI, 2014 WL 5826984, at *3 (N.D. Cal. Nov. 10, 2014) (striking affirmative defense because "[f]ailure to state a claim is not a proper affirmative defense but, rather, asserts a defect in [plaintiff's] prima facie case"); *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007) ("Failure to state a claim is a defect in the plaintiff's claim; it is not an additional set of facts that bars recovery notwithstanding the plaintiff's valid prima facie case. Therefore, it is not properly asserted as an affirmative defense."). And similarly, where respondents have—as here—asserted denials of plaintiff's claims as affirmative defenses, courts have struck such affirmative defenses. *J & J Sports Prods., Inc. v. Terry Trang Nguyen*, No. C 11-05433 JW, 2012 WL 1030067, at *3 (N.D. Cal. Mar. 22, 2012) (striking affirmative defense for being "merely denials of the allegations and claims set forth in the Complaint"); *E.E.O.C. v. SVT, LLC*, No. 2:13-CV-245-PRC, 2013 WL

6045972, at *2 (N.D. Ind. Nov. 14, 2013) ("Because [the affirmative defense at issue] is essentially a denial of liability or causation, it is not an affirmative defense and is stricken."); *Modern Creative Servs., Inc. v. Dell Inc.*, No. CIV.A.05-3891(JLL), 2008 WL 305747, at *2 (D.N.J. Jan. 28, 2008) (striking affirmative defense as an improper denial because "the entire premise of the [] affirmative defense is that the allegations in the Amended Complaint are anything *but* true").

Thus, given that the Port Authority's first and second affirmative defenses are simply "denials of [Maher's] allegations or allegations that the [Maher] cannot prove the elements of [its] claims," *Hartford Underwriters*, 2016 WL 127390, at *2, the Presiding Officer should strike the Port Authority's first and second affirmative defenses as improper.

II. The Affirmative Defenses Should Be Stricken As Not Properly Pleaded

A. The Port Authority Has Failed to Satisfy 46 C.F.R. § 502.62(b)(2)(iv), Which Mandates Defendants Must Plead Any Additional Facts on Which Affirmative Defenses are Based

Additional deficiencies require the Port Authority's affirmative defenses to be stricken. Commission Rule 62(b)(2)(iv) is clear on its face and is not subject to any differing interpretations: an answer "*must* contain . . . [a]ny affirmative defenses, *including allegations of additional facts on which the affirmative defenses are based*." *Id*. (emphasis added).

The Commission expressly mandates a more stringent standard for the factual pleading of affirmative defenses than required by Fed. R. Civ. P. 8(c). And in all events, as explained above, Fed. R. Civ. P. 12(f) and the jurisprudence applying it plainly require specific and plausible factual allegations to sustain an affirmative defense. So, the lax standard of Fed. R. Civ. P. 8(c) provides no protection to the Port Authority here.

The Port Authority defied the Commission's Rule 62(b)(2)(iv) requirement that a party *must* plead "additional facts on which the affirmative defenses are based." Instead, the Port

Authority poorly pled four of its affirmative defenses (Nos. 1, 3, 4, and 5) without alleging *any* factual support:

1) First Defense - "The claims for relief asserted by Complainant, in whole or in part, fail to state facts sufficient to constitute a claim for relief against the Port Authority. The facts supporting this affirmative defense will be developed during discovery;"

2) Third Defense - "The claims for relief asserted by Complainant are barred, in whole or in part, by the applicable statute of limitations. Among other things, Counts I and VIII concerning consideration required for consent or changes of ownership or control are premised upon allegations regarding a policy outside the statute of limitations and upon certain changes of control that occurred outside the statute of limitations;"

3) Fourth Defense - "The claims for relief asserted by Complainant are barred, in whole or in part, by collateral estoppel. The facts supporting this affirmative defense will be developed during discovery;" and

4) Fifth Defense - "The claims for relief asserted by Complainant are barred, in whole or in part, based on Complainant's lack of standing. The facts supporting this affirmative defense will be developed during discovery."

Amended Answer at 10–12. Such affirmative defenses, without any "allegations of additional facts on which the affirmative defenses are based," fail to satisfy Rule 62(b)(2)(iv). Therefore, the Presiding Officer should strike the Port Authority's affirmative defenses (Nos. 1, 3, 4, and 5) for failing to include *any* additional factual allegations on which the alleged affirmative defenses are based.

Affirmative defenses Nos. 1, 3, and 4 merely parrot that "facts . . . will be developed during discovery." This patently fails to satisfy Rule 62(b)(2)(iv). And with respect to No. 4, collateral estoppel, the Commission has already soundly rejected the PANYNJ's assertions and arguments. Order at 61–65.

Affirmative defense No. 2 regarding an unidentified statute of limitation merely asserts conclusions with respect to the consent fee counts that they pertained to "a policy" and "certain changes of control that occurred outside the statute of limitations." Likewise, these conclusions

fail to satisfy Rule 62(b)(2)(iv), Fed. R. Civ. P. 12(f) and the jurisprudence interpreting it set forth above, and the Commission's own new *Iqbal/Twombly* plausibility standard as set forth in the Order. The Commission also previously considered PANYNJ's arguments that Counts I and VIII were barred by a statute of limitations and rejected them, despite PANYNJ's arguments referencing "officially noticeable facts" not even alleged in the affirmative defense. Order at 66–67.

B. The Port Authority Failed to Plead Sufficient Facts to Render Its Affirmative Defenses Plausible

In addition to the heightened pleading standard set forth in Commission Rule 62(b)(2)(iv), "[a] majority of district courts have held that the *Iqbal* standard is applicable to affirmative defenses."[2] *Lucas v. Jerusalem Cafe, LLC*, No. 4:10-CV-00582-DGK, 2011 WL 1364075, at *1 (W.D. Mo. Apr. 11, 2011); *see also Francisco v. Verizon S., Inc.*, No. 3:09CV-737, 2010 WL 2990159, at *6, n.3 (E.D. Va. July 29, 2010) (holding that "[t]he majority of district courts have extended the *Twombly–Iqbal* standard to a defendant's pleading of affirmative defenses" and collecting cases); *Shield Tech. Corp. v. Paradigm Positioning, LLC*, No. 11 C 6183, 2012 WL 4120440 at *8 (N.D. Ill. Sept. 19, 2012) (adopting the "majority view that *Twombly* and *Iqbal* apply to affirmative defenses."). "After *Twombly* and *Iqbal*, an affirmative defense must be pled in a way that is intelligible, gives fair notice, and is plausibly suggested by the facts." *Topline Sols., Inc. v. Sandler Sys., Inc.*, No. L-09-3102, 2010 WL

[2] The minority of district courts which have held that *Iqbal* and *Twombly* do not apply to affirmative defenses premise their holdings on the language of Fed. R. Civ. P. 8(c), specifically that "[t]here is no requirement under Rule 8(c) that a defendant plead any facts at all." *Serby v. First Alert, Inc.*, 934 F. Supp. 2d 506, 515–16 (E.D.N.Y. 2013). However, such a rationale—to the extent it has any merit—is inapplicable to Shipping Act proceedings before the Commission. In contrast to Fed. R. Civ. P. 8(c), an answer in a proceeding before the Commission "*must* contain . . . [a]ny affirmative defenses, *including allegations of additional facts on which the affirmative defenses are based*." 46 C.F.R. § 502.62(b)(2)(iv) (emphasis added). And they must be *verified*. Simply put, a defendant asserting affirmative defenses before the Commission must provide sufficient verified facts to satisfy the plausibility requirement.

2998836, at *1 (D. Md. July 27, 2010) (internal quotations omitted). Where a "defendant has set forth nothing more than 'boilerplate' language, without any reasonable factual basis," courts have found such affirmative defenses as failing under the *Iqbal*/*Twombly* pleading standard. *Carretta v. May Trucking Co.*, No. CIV. 09-158-MJR, 2010 WL 1139099, at *2 (S.D. Ill. Mar. 19, 2010). And as the Presiding Officer has previously held in this proceeding, while applying the standards set forth in *Iqbal* and *Twombly*, "[a] pleading that offers 'labels and conclusions' … will not do." Initial Decision Granting Motion to Dismiss, at 3 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Thus, "[t]o state an affirmative defense sufficiently to make a showing, a defendant must plead 'enough facts to state a claim of relief that is plausible on its face.'" *J & J Sports Prods., Inc. v. Ramirez Bernal*, No. 1:12-CV-01512-AWI, 2014 WL 2042120, at *2 (E.D. Cal. May 16, 2014) (citations omitted); *cf. Tara Prods., Inc. v. Hollywood Gadgets, Inc.*, No. 09-61436, 2009 WL 4800542, at *1 (S.D. Fla. Dec. 11, 2009) ("Although Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant must give the plaintiff 'fair notice' of the nature of the defense and the grounds upon which it rests.") (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). And, it is beyond cavil that the Commission has now firmly embraced the *Iqbal/Twombly* pleading standard: "Even if we were to find that we had a . . . rule on point, we would nonetheless interpret that rule so as to follow *Iqbal/Twombly* in light of the similarities between 46 C.F.R. § 502.62 and Federal Rule of Civil Procedure 8(a) and between Shipping Act proceedings and district court litigation." Order at 17 n. 12.

The Port Authority has plainly failed the *Iqbal*/*Twombly* pleading standard and has instead asserted affirmative defenses that are wholly conclusory and utterly unsupported by facts, and thus, lack plausibility. As previously noted, the Port Authority has failed to plead facts in

support of four of its alleged affirmative defenses (Nos. 1, 3, 4, and 5)—instead asserting merely that "facts . . . will be developed during discovery" and "conclusions" devoid of any facts—and as a result, has failed to assert affirmative defenses that are plausible on their face. Where plaintiffs allege affirmative defenses containing only "barebones recitations of legal doctrines with no supporting facts," courts routinely strike such affirmative defenses for failing to have been sufficiently pleaded. *Harris v. Chipotle Mexican Grill, Inc.*, 303 F.R.D. 625, 630 (E.D. Cal. 2014) (striking defendants' affirmative defenses as "barebones recitations of legal doctrines with no supporting facts and no apparent connection to the allegations in plaintiffs' FAC" and which "pose a risk that plaintiffs will have to engage in futile discovery"); *see also HW Aviation LLC v. Royal Sons, LLC*, No. 807-CV-2325-T-23MAP, 2008 WL 4327296, at *7 (M.D. Fla. Sept. 17, 2008) (recommending affirmative defenses be stricken for "contain[ing] only bare-bones legal conclusions, with no assertions connecting the stated affirmative defenses with the factual allegations in this case").

With respect to the Port Authority's second affirmative defense, in addition to being improperly alleged as an affirmative defense, see discussion *supra* Section I, the Presiding Officer should also strike this defense for failing to plead facts that render the defense plausible. As the Commission ruled in this very proceeding, the *Iqbal*/*Twombly* pleading standard requires a party plead facts that not just "conceivably" support an allegation, but facts that "plausibly" support an allegation. Order at 44. Indeed, according to the Commission's own decision in this proceeding the pleader must allege the "who, what, when, where, and how" of its affirmative defenses. Order at 26. And here as the Commission held, "[t]here is nothing to suggest that PANYNJ did [] have a legitimate business reason" for its conduct. Order at 42. With respect to Counts I and VIII—transfer and/or change of ownership and/or control interests—the Port

Authority's defense ignores the gravamen of Maher's Complaint. As the Commission ruled with respect to Count I, "it is reasonable to infer from the fact that some terminal tenants are charged nothing and other terminal tenants are charged millions of dollars that the Port Authority's practices might be excessive and not fit and appropriate to the end in view." Order at 33. And with respect to Count VIII, the Commission ruled, "it is reasonable to infer from the magnitude of the consideration (millions of dollars for some, nothing for others) that the differences amounted to a preference or prejudice" and "to infer from the magnitude of the consideration that the Port Authority's treatment of the port tenants is not supported by legitimate factors." Order at 35. Nothing the Port Authority alleges in its second affirmative defense grapples with this.

Concerning Counts VI and XII—the Global Lease and Qualified Transferee provision—the Port Authority's purported affirmative defense merely alleges its actions were justified. Moreover, the Port Authority's assertions ignore the gravamen of Maher's Complaint. As the Commission ruled with respect to Count VI, "the allegations that Maher and others were categorically excluded from leasing the Global terminal reasonably allow the inference that the Port Authority's conduct was not reasonably related to a legitimate goal." Order at 39. And with respect to Count XI, the Commission likewise ruled, "these [categorical exclusion] allegations support an inference of unreasonableness." Order at 40. Nothing the Port Authority alleges in its second affirmative defense grapples with this either.

There are "a number of [il]legitimate reasons" for the Port Authority's conduct, as presented in Maher's Complaint, and the "allegations [in the Port Authority's second affirmative defense] do not contain sufficient facts to allow the Commission to reasonably infer that the Port Authority acted []lawfully." Order at 50. In other words, the Port Authority's allegations "are

not sufficient" to state an affirmative defense, "given the likely and obvious [il]legitimate explanations for the conduct." Order at 46. Accordingly, the Presiding Officer should strike the Port Authority's affirmative defenses for failing to meet "[t]he plausibility standard set forth in [*Twombly* and *Iqbal*]" and as adopted by the Commission in this proceeding. *Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 534 (D. Md. 2010).

CONCLUSION

For the foregoing reasons, Maher respectfully requests that the Presiding Officer strike the Port Authority's affirmative defenses for improperly asserting denials and/or allegations that Maher cannot prove elements of its claims as affirmative defenses, failing to adhere to 46 C.F.R. § 502.62(b)(2)(iv), and failing to plead sufficient facts so as to render the affirmative defenses plausible. Further, consistent with rule of the case, the Port Authority should be denied leave to amend its answer, given the parties' "prior history," and that the parties have "engaged in extensive discovery." Order at 70. "[M]any of the facts necessary to flesh out [the Port Authority]'s allegations have presumably been in its possession for years." Order at 71–72. The Port Authority's obstinate refusal to plead such facts, despite Maher's requests, is only further evidence of the absence of any facts that would render the Port Authority's affirmative defenses plausible. Moreover, striking these affirmative defenses will streamline this proceeding substantially by unburdening the parties and the Commission with needless discovery and discovery disputes which the Port Authority has recently signaled in its March 1, 2016 status report that it is planning. Therefore, the Port Authority should be denied leave to further amend its answer to cure the defects manifest in its purported affirmative defenses.

Dated: March 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2016, a copy of the foregoing was served by e-mail and Federal Express on the following:

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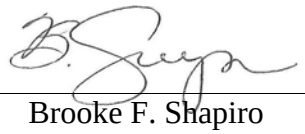

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